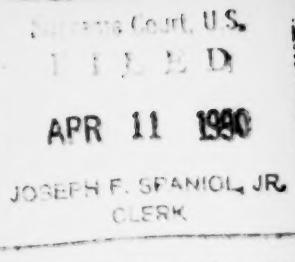


89-1601



No.

**In the Supreme Court of the
United States
APRIL TERM, 1990**

**JOHN E. FULLER
d/b/a PARTY TIME PRODUCTIONS
*Petitioner***

vs.

**THE MAYOR AND ALDERMAN OF THE
CITY OF SAVANNAH, GEORGIA
*Respondent***

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JURISDICTIONAL STATEMENT

John E. Fuller, Pro Se
1008 West 17th Street
Jacksonville, FL 32209

Respondents Attorney

Patrick T. O'Connor, Esquire
Weiner, Ginsberg, Shearouse
14 East State Street
Post Box 10105
Savannah, GA 31412-0305

April 10, 1990

I

QUESTIONS PRESENTED

This case involves a civil cause of action. Suit was brought against the Mayor and Alderman of the City of Savannah Georgia for Breach of Contract.

The questions presented are:

- (1) Whether the discretionary use of denying plaintiffs motion for a continuance, thusly forcing plaintiff to go to trial without an attorney violates his constitutional rights?
- (2) Whether the trial judge can express his opinions to the jury as to what has or has not been proven, without violating the plaintiffs right to a fair and equal trial?
- (3) Whether the statue used to dismiss the plaintiffs appeal violates his fifth and fourteenth constitutional amendment rights?

II

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TABLE OF AUTHORITIES

Cases

Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981)

Lyon v. Mutual Benefit Health Accident Ass'n,
Ark 1939, 59 S. Ct. 297, 305 U.S. 484 83 L.Ed 303

Constitutional Provisions

U.S. Const. Amend 5
U. S. Const. Amend 6
U.S. Const. Amend 7
U. S. Const. Amend 14

Statutory Provisions

28 U.S.C. 1257 (3)
Georgia Code (O.C.G.A. §5-6--48)
Georgia Code (O.C.G.A. §9-10-167)
O.C.G.A. §9-10-155
CIVIL CODE 1910 §5718
O.C.G.A. §9-10-7

STATEMENT

In this proceeding the constitutionality of the discretionary powers used by the judge to deny the motion for a continuance, instructions to the jury and the statute used to dismiss the plaintiffs motion for appeal are drawn into question.

Also, the Georgia Court of Appeals ruling upholding the trial judges' decisions are drawn into question.

OPINIONS BELOW

The order of the Supreme Court of Georgia which denied review of the Georgia Court of Appeals decision is reported and is reprinted in the Appendix as A5.

The decision of the Georgia Court of Appeals is reported and reprinted in the Appendix as A4.

The Order Dismissing Appeal by the Superior Court Judge is reported and reprinted in the Appendix as A3.

The ruling denying plaintiff's motion for a new trial by trial judge is recorded and reprinted in Appendix as A2.

The charge to the jury is recorded in the transcript of record and excerpts appear in the Appendix as A16.
Section 3

The ruling denying plaintiff's motion for a Continuance is recorded in the transcript of record and is reprinted as Appendix A1.

JURISDICTIONAL GROUNDS

On January 11, 1990 the Supreme Court of Georgia entered an order denying review of the Georgia Appellate Court Judgement of November 14, 1989. This judgement affirmed the Dismissing of Appeal Order by the Superior Court of Chatham County on February 1, 1989. This appeal is being docketed within Ninety days from the entry of the order denying Appellants Petition for certiorari by the Georgia Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) as an appeal which draws into question the judges denial of a continuance, instructions to the jury and a section of the Georgia Code (O.C.G.A. §5-6--48) on grounds that their applications are repugnant to the constitution of the United States.

STATUTORY PROVISION INVOLVED

Georgia Code §9-10-167

Continuance in discretion of court; countershowing to motion for continuance.

A) All applications for continuances are addressed to the sound legal discretion of the court and if not expressly provided for, shall be granted or refused as the ends of justice may require.

Georgia Code §5-6--48

DELAY IN FILING TRANSCRIPT

A) Unreasonable, inexcusable delay. Appellant responsible for delay-- The fact that an unreasonable delay in the preparation of the transcript is not the fault of the appellant does not excuse a filing delay in the absence of a proper request by the appellant for an extension of time. This being so, the trial court is authorized to dismiss the appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U. S. Constitution provides in part:

"No person shall ... be deprived of life, liberty or property, without due process of law; "

The Sixth Amendment to the U. S. Constitution provides in part:

"... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel..."

The Seventh Amendment to the U.S. Constitution provides in part:

"...the right of trial by jury shall be preserved..."

The Fourteenth Amendment to the U. S. Constitution provides in part:

"Nor shall any state deprive any person...: nor deny to any person within its jurisdiction the equal protection of the Laws."

STATEMENT OF THE CASE

In 1980 the petitioner contracted with the City of Savannah to promote a Fourth of July concert. On July 4, 1980 the concert was cancelled by the arena manager. A Breach of Contract Suit was filed by the law firm of Alston & Bird in 1981. September 1987 our case received a trial date of October 12, 1987 at 10:00 a.m.

After seven years and over \$10,000 of paid legal fees, Jay Bennett, Esq. of Alston & Bird withdrew from the case. This withdrawal was granted by Judge Head on September 22, 1987, (A-7). On the 30th of September a formal request was sent to Judge Head for a continuance, (A-8). There was no response from the court on this request.

10:00 a.m., October 12, 1987 Judge Head called the case. Plaintiff entered an oral motion for a continuance, (A1). The motion was immediately denied. Facing the choice of

forfeiting the case in favor of the defendant or proceeding as Pro Se, the plaintiff chose the latter under protest. The trial proceeded and the judge charged the jury on the afternoon of the 13th. After two verdicts were given to the Judge, he accepted the third verdict on the afternoon of the 15th, (A9).

Plaintiff sought legal counsel for appeal process. But because the transcript of record had not been transcribe by the court reporter, plaintiff was unable to get a firm commitment from legal counsel. In order to preserve his appeal rights plaintiff filed a Motion for a New Trial, (A10) along with a letter requesting the transcript of the trial. This motion was filed on November 12, 1987. It was denied by Judge Head on the 3rd of Febuary 1988, (A3).

Still without counsel and the transcripts, the plaintiff filed a Notice of Appeal, (A11). On March 4th 1988 after filing the appeal notice the plaintiff visited the court reporter (William Deloach) and requested the transcripts. Mr. Deloach promised that the transcripts would be done in a couple of weeks. The weeks had passed and the transcripts were not filed. The plaintiff contacted Mr. Deloach on serveral other occasions for the transcripts, however to date no transcripts were filed with the court.

On October 16th, 1988 plaintiff received a letter from Judge Head (A12) along with the defense motion to dismiss our appeal. The Judge ordered a November 14, 1988 hearing on defendants motion. Without the transcripts and counsel, plaintiff again protected his appeal by issuing a counter motion and a motion to compel court reporter (A13). The hearing was held on the 14th and the plaintiff gave oral arguments on the reason for delay and not filing an extension of time. On November 18, 1988, the Judge granted the defense attorney's motion to dismiss our appeal, (A3).

November 14, 1988 the plaintiff received the transcripts of records which were filed with the court on the 10th of November 1988. Plaintiff fowarded the transcripts to Mr. David Webster, Esquire. He accepted to handle the appeal.

The plaintiff reviewed the transcripts with his attorney and informed him that there were sections missing from the transcripts. One was the section which contained the oral motions, the other was the plaintiffs' summation of the case to the jury.

On February 28, 1989 Attorney Webster filed a Second Notice of Appeal. In our second notice of appeal we motioned the court to supplement our transcripts, (A14) because of the missing motions and their rulings.

May 8, 1989 Counsel filed our appeal with the Georgia State Court of Appeals, case #A89A1432. The Enumerations of Errors (A15) were filed along with the Appellants Brief. (Brief recorded but not reprinted in appendix). November 14, 1989 the Court of Appeals upheld the lower court ruling, (A4).

November 27, 1989 a motion for rehearing was filed. The motion was denied by the Court of Appeals on November 29, 1989.

December 6, 1989 Counsel filed a Notice to Seek Certiorari with the State Supreme Court, (A16). On the 8th of December the Appellant received a letter from the Court reporter, (A17). The letter was filed along with our petition for Certiorari in the State Supreme Court of Georgia on the 19th of December. On the 11th of December, 1989 the plaintiff received another letter from the Court reporters office which was the missing section of the transcripts which includes the oral motions, (A1). This portion of the record was filed by the Court reporters office on the 8th of December, 1989.

January 11, 1990 the Supreme Court of Georgia denied our petition for Certiorari, (A5).

REASONS FOR GRANTING THIS PETITION

The federal questions in this case are very substantial. This petition presents several important constitutional issues:

A) the right of a plaintiff in a civil trial to have legal counsel, B) the right of a plaintiff in a civil action to have a fair and equal trial, C) the right to have a jury decide the contested issues, and D) the due process of law for a civil action.

If the Federal Rules of Civil Procedures gives the plaintiff similar constitutional rights in civil actions as those in criminal proceedings, then the petitioner's constitutional rights have been violated. In Lyon v. Mutual Benefit, Health and Accident Association, the courts held that: "Litigants in Federal Courts cannot by state rules of procedures be deprived of fundamental rights guaranteed by the constitution and laws of the United States, such as the right to a trial by jury, Ark 1939, 59 S.Ct. 297, 305 U.S. 484, 83 L.Ed 303.

A) By denying plaintiff's motion for a continuance, (A-1) the court is in clear and direct conflict with O.C.G.A. §9-10-155:

Same Illness or Absence of Counsel: Oath of Party

"The illness or absence from providential cause of counsel where there is but one... shall be a sufficient ground for a continuance, (Civil Code 1910 §5718)." And the U.S.C.A. const. amend. 6:

"...and to have the Assistance of Counsel for his defense." In Johnson v. Hopper the court held that violation of right to counsel is not harmless error.

"The constitutional right to the assistance of counsel is a right so basic to a fair trial that its infraction cannot be treated as harmless error. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. # 639 F.2d 236 (5th Cir. 1981)

B) The trial judge gave instructions to the jury which biased the facts against the plaintiff. (A15). This action violates the O.C.G.A. §9-10-7;

Expression by judge of opinion in case reversible error.
"It is error for any judge, during the progress of any case, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved. Should any judge violate this code section, the violation shall be held by the Supreme Court or Court of Appeals to be error, the decision in the case shall be reversed and a new trial shall be granted in the court below with such directions as the Supreme Court or the Court of Appeals may lawfully give."

This expression by the judge violated the plaintiff's seventh amendment rights to have the jury decide the factual issues in the case.

C) The denial of the plaintiff's Motion for a New Trial and the dismissing of his appeal has denied him due process of the law. The court relied on its discretion to deny a new trial and used Georgia Code O.C.G.A. §5-6-48 to dismiss the appeal. Both actions kept plaintiff from legal assistance. This clearly conflicts with the fifth and fourteenth Amendments of the constitution which guarantees a person due process of the law as well as equal protection of law.

D) The Georgia Court of Appeals upheld the lower court ruling. In their opinion, they reviewed only parts of the plaintiff's appeal. They failed to review the Enumerations of Errors, (A15) along with the Appellant's total brief. They relied heavily on the Glen Restaurants v. Building S Association, 189 Ga. App. 327.(375 SE 2d 492) (1988) ruling. This ruling was retroactively applied to our case. Their failure to review the total merits of the appellant appeal has violated his fifth and fourteenth constitutional amendment rights.

E) The Supreme Court of Georgia refused the petition for certiorari on January 11, 1990. This refusal reinforces the constitutional violations of the Trial Judge and the Appeals Court.

If this Court agrees with **just one** of our submissions, then our petition for certiorari should be granted.

CONCLUSION

For the aforementioned reasons, the Petitioner humbly requests that this Court grant certiorari. Oral arguments will be presented by an Attorney of the Bar.

Respectfully submitted,

John E. Fuller
Pro Se

(A-1)

IN THE SUPERIOR COURT
EASTERN JUDICIAL CIRCUIT, STATE OF GEORGIA

JOHN FULLER, INDIVIDUALLY
AND d/b/a
PARTY TIME PRODUCTIONS,

Plaintiff,
vs.

C.A. #X82-18093

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Defendants

Transcript of the CALENDAR CALL preceding the trial of
the above matter on October 12, 1987, in the Couthouse at
Saavannah, Chathan County, Georgia, before the Hon.
JAMES W. HEAD, Judge, Superior Court, E.J.C. of
Georgia.

APPEARANCES:

FOR THE PLAINTIFF: PRO SE

FOR THE DEFENSE: PATRICK O'CONNOR, ESQ.
Savannah, Georgia

Reported by:

ALIDA G. SMITH
CCR B-818
Savannah, Georgia

(A1) cont.

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(A1) cont.

THE COURT: These are civil cases. Please respond as I call them. John Fuller, individually and doing business as Party Time Productions versus The Mayor and Aldermen of the City of Savannah.

MR. O'CONNOR: Your Honor, we're ready for the Defendant.

THE COURT: Anybody here? You ready, Mr. Fuller?

MR. FULLER: No, we're not.

THE COURT: All right, sir.

(PAUSE)

(NOTE: Other cases were called' whereupon, the following transpired:)

THE COURT: All right, Mr. Fuller, let's see what you have to say, sir.

(PAUSE)

MR. FULLER: Your Honor, for the record, I'm requesting a continuance of this case. This continuance is requested because of the following reasons. I have not secured legal counsel since my attorney withdrew on September 22, 1987. I am prepared to give the facts of this case; however, I do not possess the legal skills to appropriately present this case. Since the withdrawal of my counsel, there has been no adequate time to subpoena any witnesses. Also counsel has been sought; however, they do not have enough time to prepare an adequate presentation of my case. In conclusion, I'm requesting that any pending defense motions be withheld until my counsel can appropriately respond.

THE COURT: All right, sir, your motion's denied, sir.

(PAUSE)

(NOTE:) Other matters were discussed; whereupon, the following transpired:)

THE COURT: After considering the -- you can have a seat, sir, we're ready to try the case. After considering the motions of the City for quash of summary judgment, the Court will grant the same and order you to prepare an

(A1) cont.

order on that, please.

(PAUSE)

THE COURT: What issues do we have to try at this time?

MR. O'CONNOR: Your Honor, we've got a contract claim by the Plaintiff that is based upon three allegations. One, that the City of Savannah failed to open the Civic Center for this particular concert. Second, that the City breached its contractual obligation by not obtaining tickets for the event. And third, that the City scheduled a similar event the day after this particular concert. And Mr. Fuller's asking for actual and consequential damages as a result of those alleged breaches of contract.

THE COURT: All right, sir. Mr. Fuller, do you wish to have a jury in this matter?

MR. FULLER: Yes.

THE COURT: All right, bring the jury in, please.

(PAUSE)

THE COURT: The City wants it reported?

MR. O'CONNOR: Yes, sir.

THE COURT: Mr. Fuller, do you want this case reported?

MR. FULLER: Yes.

THE COURT: Report is under the rule, please.

COURT REPORTER: Yes, sir.

(PAUSE)

(A1) cont.

MR. FULLER: Your Honor, may I go to my car and get some papers, some documents?

THE COURT: Sure.

(NOTE: Mr. Fuller left the courtroom.)

(PAUSE)

MR. O'CONNOR: . . . that we can take up when Mr. Fuller gets back. There's a very brief motion in limine by the City.

THE COURT: What's it about?

MR. O'CONNOR: Well, part of it has been taken care of, in light of the ruling on summary judgment. The remaining portion dealt with hearsay testimony relating to the City's obtaining tickets.

THE COURT: All right, sir.

MR. O'CONNOR: And track record on other concerts by these performers. We're trying to keep hearsay out in respect to those two items of proof.

THE COURT: Well, we'll strike a jury first, then we'll listen to them.

(NOTE: Mr. Fuller returned to the courtroom; the jury selection proceeded; the motion in limine was heard after jury selection; and the trial commenced. A separate trial transcript, including the motion in limine hearing, has been prepared and filed, certificate of Court Reporter dated November 3, 1988.)

(A1) cont.

CERTIFICATE

This is to certify that the foregoing six (6) pages of typewritten material were taken down and transcribed by me, and that the same contain a true and correct transcript of said proceedings.

I further certify that I am a disinterested party to these proceedings, and that I am not of kin nor counsel to any of the parties hereto.

This 4th day of December, 1989.

ALIDA G. SMITH
Certified Court Reporter
Certificate Number B-818
Savannah, Georgia

(A2)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, INDIVIDUALLY
AND D/B/A PARTY TIME
PRODUCTION

PLAINTIFF,

VS

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

DEFENDANTS.

CIVIL ACTION
NO. 18093

ORDER ON PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff has filed a motion for new trial in the above styled action. Defendants oppose said motion. After due consideration of the motion, the response thereto and all matters of record, the court hereby DENIES said motion on each and every ground asserted therein.

SO ORDERED this 3rd day of February, 1988.

JAMES W. HEAD, JUDGE
SUPERIOR COURT, E.J.C., GEORGIA

(A3)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually,
and d/b/a PARTY TIME
PRODUCTION,

Plaintiff,

v.

THE MAYOR AND ALDERMAN,
OF THE CITY OF SAVANNAH.

Defendant.

CIVIL ACTION
NO. 18083-H

ORDER DISMISSING APPEAL

Whereas, the present action was tried before a jury and judgment was entered on the verdict of said jury by this Court of October 16, 1987. On November 12, 1987, the Plaintiff filed a motion for new trial. This court denied Plaintiff's motion for new trial by order filed February 3, 1988. On March 4, 1988, Plaintiff filed a notice of appeal with this Court in which he designed that no portion of the record would be omitted on appeal and that a transcript of evidence and proceedings should be filed for includion in the appeal record. The defendant filed its motion to dismiss appeal on October 14, 1988 and this Court set the motion for hearing on November 14, 1988. The transcript of evidence and proceedings was filed with the Clerk of this Court on November 10, 1988. At the hearing on November 14, 1988, Plaintiff appeared pro se and Defendant appeared through counsel.

Pursuant to O.C.G.A. §5-6-48, the trial court is vested with discretion to order that an appeal be dismissed where

(A3) cont.

there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by the party seeking the appeal. O.C.G.A. §5-6-48 (c). This Court is cognizant of the inexcusable. Young v. Climatrol Southeast Distributing Corporation, 237 Ga. 53, 226 S.E.2d 737 (1976).

In the present action, there was a delay of 8 months and 6 days after the filing of the notice of appeal before that transcript was filed. It is undisputed that no transcript was filed within 30 days of the notice of appeal nor was a motion or request for the time to be extended filed within said 30 days or at any other time. At the hearing on Defendant's motion to dismiss appeal, the Plaintiff offered no excuse whatsoever for having failed to file a request for extension of time in which to file the transcript. This case is, therefore, controlled by In Re G.W. H., 168 Ga. App. 845, 310 S.E. 2d 573 (1983) in which the trial court was affirmed after it dismissed an appeal following a delay of 4 months and 16 days in filing the transcript. The Court of Appeals pointed out that, even assuming the party seeking the appeal was not personally at fault for the delay, such party was not excused from requesting an extension of time in which to file the transcript.

This Court has inquired into the reasonableness and inexcusability of Plaintiff's failure to file the transcript. There having been no request for extension of the date in which to file and transcript and no excuse offered for such failure, and there having been a delay of 8 months and 6 days after the finding of this Court that the Plaintiff's delay in filing the transcript was both unreasonable and unexcusable.

It is therefore ordered that Defendant's motion to dismiss appeal be and is hereby granted.]

So ordered that 17th day of November 1988.
THE HONORABLE JAMES W. HEAD, JUDGE

(A4)

In the Court of Appeals of Georgia.

A89A1432. FULLER v. THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH

(BEA-159)

BEASLEY, Judge.

In June 1980, Fuller dba Party Time Production entered into an agreement with the Mayor and Aldermen of the City of Savannah to lease the Savannah Civic & Convention Center for a July 4 Peabo Bryson concert. The performance was cancelled. Fuller, individually and d/b/a Party Time Production, filed an amended eight-count complaint against the Mayor and the Aldermen alleging breach of contract, unlawful interference with contractual relationships, misrepresentation, false imprisonment, negligence, and violation of 12 U.S.C.A. §1982 and 1983. Defendants counterclaimed for expenses incurred as a result of the lease plus punitive damages and costs.

The case went to the jury on the breach of contract claims and on the counterclaim. The jury returned a verdict of \$2,135.00 for Fuller in the case in chief and \$2,135.50 plus interest for the mayor and aldermen on the counterclaim. Judgment was entered accordingly.

Fuller, who represented himself at trial, unsuccessfully moved for a new trial. He filed a notice of appeal pro se from the judgment on March 4, 1988. The notice specified that no portion of the record was to be omitted on appeal and that a transcript of evidence and proceedings would be filed for inclusion.

(A4) cont.

On October 14, defendants moved to dismiss the appeal on the basis that plaintiff's failure to have the transcript filed was inexcusable and unreasonable. The transcript was filed on November 10. Following a hearing, the trial court dismissed the appeal on November 18 specifically finding that there was a delay of eight months and six days after the filing of the notice of appeal before that transcript was filed, that there was no motion or request for an extension of time in which to file the transcript, and that at the hearing, plaintiff offered no excuse whatsoever for having failed to file a request for extension.

On January 27, 1989, Fuller moved for re-entry of the dismissal order nunc pro tunc on the basis that he had not received a copy of it. The court accepted that Fuller had not received notice of the order and re-entered the order dismissing the appeal on February 1, nunc pro tunc November 17, 1988, the date the previous order had been signed.

Fuller appeals from the February 1 order. He challenges the dismissal of his first notice of appeal as well as the trial court's grants of summary judgment on certain of his claims, the refusal to allow the reopening of evidence, certain aspects of the jury charge, the court's refusal to accept the initial verdict and the court's refusal to grant a new trial.

1. The dismissal of the appeal must be addressed first as it is dispositive.

a) Although the essence of the February 1 order was a restatement of the November 18 dismissal, it is properly the subject of this appeal because it is undisputed that Fuller failed to receive timely notice of the initial ruling. Compare Duncan v. Ball, 174 Ga. App. 341, 344

(A4) cont.

(III) (330 SE2d 160) (1985). Although the second order was entered at the following term of court, see OCGA §15-6-3 (17), the limitation of the inherent power of the trial court to change its judgment during the term at which it is entered, see Ammons v. Bolick, 233 Ga. 324, 325 (1) (210 SE2d 75) (1974), is not at issue because the court was not substantively changing or modifying its determination. It was merely redating its decision to prevent Fuller being foreclosed from appellate review through no fault of his own. The Court has jurisdiction of the appeal.

b) As appellant acknowledges, his circumstance is much like that in Glen Restaurants v Building 5 Associate, 189 Ga. App 327 (375 SE2d 492) (1988). He distinguishes Glen in that it was decided after all the relevant events in his own case, and that prior to Glen it had not been decided that failure to request an extension of time was fatal to an appeal. He further maintains that despite Glen his delay was not unreasonable within the meaning of OCGA §5-6-48 (c).

Contrary to appellant's assertion, Glen was decided upon well-established principles applicable to this case. See In re G. W. H., 168 Ga. App. 845,846 (310 SE2d 573) (1983); Dampier v. First Bank & C. Co., 153 Ga. App. 756, 757 (266 SE2d 539) (1983). It reaffirmed that "[f]ailure of the appellant to request an extension for the filing of the transcript is not in itself a ground for dismissal of the appeal absent a judicial determination that the resulting delay was both unreasonable and inexcusable. Yound v. Jones, 147 Ga. App. 65 (2) (248 SE2d 49) (1978)." Glen, *supra* at 328 (2). Even if Glen forged new ground, it could appropriately be applied retroactively here. See Abu-Khdeir v. T. J. Maxx, Ga. App. (SE2d) (Case No. A89A0869, decided May 10, 1989).

Although Fuller made an initial request to obtain

the transcript, the record supports the trial court's finding that Fuller made no timely request for an extension of time in which to file a delayed transcript. Only after defendants moved to dismiss the appeal did Fuller file and affidavit attempting to chronicle his communications with the court reporter responsible for preparing it.

The court reporter was subpoenaed to the hearing on the motion to dismiss. Fuller had the opportunity to demonstrate via the reporter or otherwise any justification for his own action or inaction regarding the delay, including the failure to request an extension. The court found that Fuller did not offer any excuse for the failure and there is nothing contrary of record. "[T]he fact that the initial delay in the preparation of the transcript may not have been the fault of the defendant does not excuse the filing delay, in the absence of a proper request by the defendant for an extension of time.' [Cits.]" Glen at 328 (2) quoting Dampier, *supra*. Nor is appellant excused from the legal requirements to preserve his appeal merely because he has chosen to proceed on his own.

"The trial court's decision on the issue of the unreasonable and inexcusable nature of the delay will be reversed only for abuse of discretion. [Cit.]" Glen at 327 (2). See also Dundan, *supra* at 343 (2). Because of the more than eight-month delay in the filing of the transcript, the failure to request an extension of time, and the absence of any articulated excuse for the failure, the court did not abuse its discretion in finding the delay to be unreasonable and inexcusable. *Id.* at 328 (2).

2. The determination in Division 1 renders the remaining enumerations of error moot.

Judgment affirmed. Carley, C. J., and McMurray, P. J., concur.

(A5)

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: JANUARY 11, 1990

Mr. David A. Webster
SUMNER & HEWES
The Hurt Building
50 Hurt Plaza, Suite 700
Atlanta, GA 30303

Case No. S90C0395

**JOHN FULLER ET AL. V. THE MAYOR AND
ALDERMEN OF THE CITY OF SAVANNAH**

(COURT OF APPEALS CASE NUMBER: A89A1432)

The Supreme Court today denied the petition for
certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

(A6) }

September 29, 1987

Mr. Jay Bennett
Attorney at Law
Alston & Bird Law Firm
100 Galleria Parkway
Suite 1200
Atlanta, GA 30339

Dear Mr. Bennett:

I take exceptions to your letter dated September 18, 1987. In your letter, you stated that I've had an outstanding bill since January of 1985. As previously mentioned, that bill has been paid. In reference to you withdrawing from my case at this time, I'm very disappointed that you chose to withdraw. I question your ethics on the way that you've withdrawn from the case. I feel that your withdrawal at this late date has caused very serious damage to my defense, and it surely has hindered the progress of my case. Also, at issue, are the filings of April 17, 1987 and July 17, 1987. I realize that I owe you a fee, but, I'm convinced that the fees listed were overcharges and inaccurate. I have paid all my bills with your law firm, except for those two disputed bills above.

Once again, I'm truly outraged with your tactics of withdrawals. I would have rather worked out any billing problems and continued with my case. Since July of 1980, I have resolved myself to have my date in court. Your actions have made my journey a little more difficult, but, I'm going on until I have my day. Please gather my records, files, and any documents which belongs to this case and send them immediately. Have them sent by UPS freight COD to:

(A6) cont.

John E. Fuller
Party Time Specialties, Inc.
12-14 East Bay Street
Suite 2101
Jacksonville, FL 32202

Thank you,

John E. Fuller
President/Manager
Party Time Production

JEF/lw

{ **cc: Judge Head**

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, individually and
d/b/a/ PARTY TIME PRODUCTIONS,

Plaintiff,

v.

THE MAYOR AND ALDERMEN OF
THE CITY OF SAVANNAH,

Defendant

CIVIL ACTION
FILE NO. 18093-0

PLAINTIFF'S COUNSEL'S REQUEST FOR LEAVE TO
WITHDRAW

Pursuant to Uniform Rule 4.3, the law firm of Alston & Bird and the undersigned request permission to withdraw as counsel to the Plaintiff. More than 30 days before filing this request, the undersigned notified Plaintiff by letter of his intention to withdraw, and counsel has received no notice of any objection. Further, counsel advised Plaintiff of his intent to withdraw in person on September 8, 1987, and at that time Plaintiff requested and acknowledged that counsel would withdraw on September 22, 1987 if outstanding fees had not been paid by that time.

By copy of the request, pursuant to Rule 4.3, the Plaintiff is hereby given notice of the following (although Plaintiff has previously been notified of this withdrawal and his duty to appear at all scheduled hearings):

- (A) The firm of Alston & Bird wishes to withdraw.
- (B) The above Court retained jurisdiction of this action.
- (C) The Plaintiff, John Fuller, has the burden of keeping the Court informed respecting where notices, pleadings or other papers may be served.

(A7) cont.

(D) The Plaintiff, John Fuller, has the obligation to prepare for trial or hire other counsel to prepare for trial which has been set for Monday, October 12, 1987 at 10:00 a.m.

(E) If the Plaintiff fails or refuses to meet these burdens, he, John Fuller, may suffer adverse consequences, including dismissal of the action or other sanctions.

(F) The trial date of October 12, 1987 will not be affected by the withdrawal of counsel.

(G) Service of notices may be made upon Plaintiff at his last known address, to wit:

Mr. John E. Fuller
Party Time Productions
P. O. Box 37168
Jacksonville, Florida 32205

Home phone: (904) 356-2472
Off. phone: (904) 356-2472

(H) Unless this withdrawal is with the Plaintiff's consent, (the undersigned states his belief that this withdrawal is with the Plaintiff's consent) the Plaintiff may file his objections to the withdrawal within 10 days of the date below.

WHEREFORE, counsel requests permission to withdraw effective September 22, 1987.

This 22nd day of September, 1987.

JAY D. BENNETT
Attorney for Plaintiff

ALSTON & BIRD
100 Galleria Parkway, Suite 1200
Atlanta, GA 30339

(A7) cont.

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and forgoing "PLAINTIFF'S COUNSEL'S REQUEST FOR LEAVE TO WITHDRAW" upon opposing counsel and upon the Plaintiff by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon , as follows:

Patrick T. O'Conner
Friedman, Haslam, Weiner, Ginsburgs,
Shearouse & Weitz
P. O. Box 10105
Savannah, GA 31412-0305

Mr. John E. Fuller
Party Time Productions
P. O. Box 37168
Jacksonville, Florida 32205

Mr. John E. Fuller
Party Time Specialties, Inc.
12-14 East Bay Street
Suite 2101
Jacksonville, Florida 32202

This 22nd day of September, 1987

JAY D. BENNETT

(A-8)

September 30, 1987

The Honorable James W. Head
Superior Court E.J.C., Goergia
Chatham County Courthouse Room 209
133 Montgomery Street
Savannah, GA 31401

RE: Civil Action
FILE NO: 18093-0

Your Honor:

This letter is to inform you of my opposition to the withdrawal of Attorney Jay Bennett from my case. I have enclosed my letter dated September 29, 1987 to Jay Bennett. It is my understanding that the request for withdrawal has been granted by the court on September 22, 1987. I received Mr. Bennett's formal notice on September 25th 1987. Since, Mr. Bennett, chose to withdraw at such a late date and his request was granted, I'm pleased with the court for a continuance. I apologize for any inconvenience this may have caused, but I now need time to retrieve my files from Alston and Bird, and secure new counsel. I've been struggling with this case for over seven years, but, I'm committed to see that it has its just end.

Thank you for your reviewing this letter and once again, I request that my case be re-scheduled for trial.

Sincerely yours,
John E. Fuller
President
Party Time Production
JEF/llw
Enclosure

(A9)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually,
and d/b/a PARTY TIME
PRODUCTION,

Plaintiff

CIVIL ACTION
NO. 18093-0

vs.

THE MAYOR AND ALDERMAN
OF THE CITY OF SAVANNAH,

Defendant

JUDGMENT

The above styled action and Defendant counterclaim thereto having come on for trial before the Court and a jury, Honorable James W. Head presiding, and the issues having been duly tried and the jury having rendered its verdict;

IT IS HEREBY ORDERED AND ADJUDGES THAT judgment be entered in favor of the Plaintiff JOHN FULLER, individually and d/b/a/ PARTY TIME PRODUCTION, and against the Defendant, THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, and that Plaintiff recover of Defendant the sum of Two Thousand One Hundred Thirty-Five and 50/100 Dollars [\$2,135.50]; and

IT IS FURTHER ORDERED AND ADJUDGED THAT judgment be entered in favor of the Defendant THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH against Plaintiff, JOHN FULLER,

(A9) cont.

individually and d/b/a PARTY TIME PRODUCTION, on Defendant's counterclaim and that Defendant recover of Plaintiff the sum of Two Thousand One Hundred Thirty-Five and 50/100 Dollars [\$2,135.50], together with interest at the rate of seven percent [7%] per annum from July 4, 1980 in the sum of One Thousand Eighty-Seven and 79/100 Dollars [\$1,087.79].

This 15 day of October, 1987.

JAMES W. HEAD, JUDGE SUPERIOR
COURT OF CHATHAM COUNTY,
GEORGIA, EASTERN JUDICIAL CIRCUIT

(A-10)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually
AND D/B/A PARTY TIME
PRODUCTION
PLAINTIFF

VS

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH

DEFENDANTS

CASE NO 18093-0

MOTION FOR NEW TRIAL

PLAINTIFF moves this Court to set aside the verdict returned herein upon 14 th day of October, 1987, and the judgment entered therein on 15th day of October, 1987, and to grant a new trial on the following grounds:

1.

The verdict is contrary to law;

2

The verdict is contrary to evidence;

3

The verdict is strongly against the weight of the evident.

4

That the Court allowed erroneous information in over objection.

(A10) cont.

5.

That the Court refused Plaintiff a Continuance upon after the Court allowed Plaintiff's counsel to withdraw without Plaintiff having an opportunity to hire additional counsel.

6.

The Court made erroneous rulings by refusing to allow specified witnesses to testify.

This 12th day of November, 1987.

JOHN FULLER, Pro Se

ADDRESS:

12-14 EAST BAY STREET
SUITE 2101
JACKSONVILLE, FL 32202
(904) 356-8565

(A10) cont.

William Deloach
Court Reporter
Chatham County Courthouse
511, 133 Montgomery Street
Savannah, Georgia 31499

NOVEMBER 12, 1987

Re: Copy of Transcript

Dear Mr. Deloach,

Please transcribe the following trial:

JOHN FULLER, Individually
AND D/B/A PARTY TIME
PRODUCTION
PLAINTIFF

VS

CASE NO. 18093-0

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH
DEFENDANTS

The above case was tried on the following dates: October 12, 1989 through October 14, 1987. The trial Judge was Judge James Head, Judge of Superior Court, Chatham County, Georgia.

My return address is: John E. Fuller
12-14 East Bay Street Suite 2101
Jacksonville, FL 32202
Phone No. (904) 356-8565

If you need a deposit for transcribing the above trial,
please contact me.

Sincerely yours,
John E. Fuller

(A10) cont.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually
AND D/B/A PARTY TIME
PRODUCTION
PLAINTIFF

VS.

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH
DEFENDANTS

CASE NO. 18093-0

CERTIFICATE OF SERVICE

This is to certify that I have this date served Counsel for all parties with a copy of the foregoing by placing a copy of same in a properly addressed envelope with sufficient postage thereon and depositing same in the United States Mail.

Pat O'Connor
Attorney-At-Law
14 East State Street
Savannah, Georgia 31401

This 12th day of November, 1987

John Fuller, Pro Se

ADDRESS

12-14 EAST BAY STREET
SUITE 2101
JACKSONVILLE, FL 32202

(A11)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually
AND D/B/A PARTY TIME
PRODUCTION,
Plaintiff

vs.

CASE NO. 18093-0

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH
Defendant

NOTICE OF APPEAL

Notice is hereby given that JOHN FULLER, Individually AND D/B/A PARTY TIME PRODUCTION, Plaintiff above named, hereby appeals to the Georgia Court of Appeals from the judgment entered on the 15th day of October, 1987.

Motion for New Trial was filed on the 12th day of November, 1987 and the Motion for New Trial was overruled on February 3, 1988.

No portion of the record is to be omitted on appeal.

Transcript of evidence and proceedings will be filed for inclusion in the record of appeal.

The Court of Appeals of Georgia, and not the Supreme Court of Georgia, has jurisdiction of this appeal since it is an appeal from a final judgment and is not one of those cases over which exclusive jurisdiction is vested in the Supreme Court of Georgia.

This 4th day of March, 1988.

John Fuller, Individually and
D/B/A Party Time Production, Pro Se

(A12)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually, and
d/b/a PARTY TIME PRODUCTION,

Plaintiff,

v.

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Defendant.

CIVIL ACTION
NO. 18093-H

RULE NISI

It is ordered that the Plaintiff named herein show cause before this Court on the 14th day of November, 1988, at 11:45 a.m., if any he can, why the prayers of Defendant's motion to dismiss appeal should not be granted.

SO ORDERED this 13th day of October 1988.

JUDGE, SUPERIOR COURT, EASTERN
JUDICIAL CIRCUIT, STATE OF GEORGIA

(A13)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually
AND D/B/A PARTY TIME
PRODUCTION
PLAINTIFF

VS.

CIVIL ACTION NO.
18093-H

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH
DEFENDANT

RESPONSE TO DEFENDANTS MOTION TO
DISMISS APPEAL

AND

MOTION TO COMPEL COURT REPORTER TO
SUBMIT TRANSCRIPT TO
PLAINTIFF AND APPROPRIATE COURT(S)

NOW COMES Plaintiff hereto, John E. Fuller, Individually, and d/b/a PARTY TIME PRODUCTION, and moves pursuant to O.C.G.A. §5-6-48 for denial of Defendants MOTION TO DISMISS APPEAL and humbly begs this Honorable Court to compel the Court Reporter to transcribe trial records and forward the transcript to Plaintiff. The Plaintiff now issues the following response to the motion and request

1. True	5. True
2. True	6. False.
3. True	
4. True	

(A13) cont.

Plaintiff has made reasonable efforts to secure the transcripts from the Court Reporter's Office. (Attached affidavit).

- a) Plaintiff orally requested transcript of trial during the October 1987 trial.
- b) Plaintiff called Mr. William Deloach (Court Reporter) on numerous occasion requesting transcripts.
- c) Plaintiff visited Mr. Deloach's office several times while in Savannah.
- d) Plaintiff filed request for transcript with Court Reporter, William Deloach in the SUPERIOR COURT OF CHATHAM COUNTY on November 12, 1987.

As to date, we have not received the transcript. Therefore, Plaintiff has reason and an excuse for not submitting transcript of evidence and proceedings.

7. False . Plaintiff's appeal should be granted so that he can be properly represented by council in a court of law.

Wherefore Plaintiff prays that this Court notes that Defendants request should be denied because the delay is in the Court Reporter's office and not with the Plaintiff. Furthermore, the Plaintiff begs the Court to compel the Court Reporter to issue transcripts to the Plaintiff without further delay for the following reasons:

- 1) Plaintiff counsel is eagerly awaiting transcript.
- 2) Plaintiff counsel will accept or reject being counsel for plaintiff based on results of transcript.
- 3) Plaintiff appeal rests on the facts as indicated by transcripts.
- 4) Plaintiff's multiple requests for transcripts have not resulted in issues of transcripts.

This _____ day of October 1988.

By: John E. Fuller, Pro Se

(A14)

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually, and
d/b/a PARTY TIME PRODUCTION,

Plaintiff,

CASE NO. 18093-0

v.

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Defendants.

PLAINTIFF'S SECOND NOTICE OF APPEAL

Notice is hereby given that JOHN FULLER, Plaintiff in the above styled action, hereby appeals to the Georgia Court of Appeals from the Order Dismissing Appeal entered in this case nunc pro tunc on February 1, 1989; and from the rulings previously appealed from the dismissed notice. The earlier notice of appeal was filed on March 4, 1988.

The Clerk will please omit nothing from the record on appeal.

The Court of Appeals, rather than the Supreme Court, has jurisdiction of this case for the reason that said case is not one retained exclusively by the Supreme Court of Georgia.

This 28th day of February, 1989.

David A. Webster
Attorney at Law

(A14) cont.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually, and
d/b/a PARTY TIME PRODUCTION,

Plaintiff,

v.

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Defendants.

CASE NO. 18093-0

MOTION TO SUPPLEMENT TRANSCRIPT

Comes now Plaintiff and shows this Court as follows:

- (1) Plaintiff has this day filed his notice of appeal from the Court's dismissal of his appeal.
- (2) Plaintiff earlier filed his notice of appeal from final judgment in his case.
- (3) Appeal from these matters requires full consideration of all motions disposed of at trial.
- (4) The transcript of the trial in this matter omits the several motions in the nature of motions for summary judgment or motions in limine offered by Defendant upon the calling of this case.
- (5) The transcript of the trial also omits this Court's disposition of those motions.
- (6) Finally, the transcript omits the Court's overruling of the Plaintiff's motion for a continuance.

(A14) cont

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

JOHN FULLER, Individually, and
d/b/a PARTY TIME PRODUCTION,

Plaintiff,

v.

THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Defendants.

CASE NO. 18093-0

BRIEF IN SUPPORT OF MOTION TO
SUPPLEMENT TRANSCRIPT

O.C.G.A. §5-6-41(d) provides that the takedown of a trial record shall include "all motions, colloquies, objections, rulings ... and all other proceedings which may be called in question on appeal. That section further provides that the record when transcribed shall be expanded upon the order of the Court where any such proceedings are omitted from the transcript.

The attached motion describes the items omitted from the transcript prepared and submitted in this case. Plaintiff hereby moves that the record be supplemented as described in the motion.

This _____ day of February 1989.

Respectfully submitted,

David A. Webster

(A15)

**COURT OF APPEALS
FOR THE STATE OF GEORGIA**

**CASE NUMBER
A89A1432**

**JOHN FULLER, Individually and d/b/a PARTY TIME
PRODUCTION,**

Plaintiff-Appellant,

v.

**THE MAYOR AND ALDERMEN OF THE CITY OF
SAVANNAH,**

Defendants-Appellees.

ENUMERATIONS OF ERROR

**David A. Webster
Georgia State Bar No. 744975**

**The Hurt Building
50 Hurt Plaza, Suite 700
Atlanta, Georgia 30303
(404) 588-9000**

Attorney for Plaintiff-Appellant

(A15) cont.

1. The trial court erred in granting summary judgment as to Plaintiff-Appellant's claims of:
 - (a) tortious interference with contractual relations;
 - (b) false imprisonment.
2. The trial court erred in refusing to allow Plaintiff to reopen the evidence to present evidence of damage.
3. The trial court erred in its jury charges to the effect:
 - (a) that the written contract between the parties was the entire agreement between them;
 - (b) that the contract imposed upon Plaintiff a duty to print concert Tickets; and
 - (c) that Defendant had the power under the contract to close down the Plaintiff's show.
4. The trial court erred in refusing to accept the verdict of the jury.
5. The trial court erred in refusing a new trial.
6. The trial court erred in dismissing Plaintiff's first appeal notice.

This case is properly within the jurisdiction of this Court, because it is not among those cases listed in the Georgia Constitution, Art. 6, .6, para. 6, over which jurisdiction is entrusted to the Supreme Court.

This 8th day of May, 1989.

Respectfully submitted,

David A. Webster
Georgia Bar No. 744975

50 Hurt Plaza
Suite 700
Atlanta, Georgia 30303
(404) 488-9000

(A16)

IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A89A1432

JOHN FULLER, Individually, and d/b/a PARTY TIME
PRODUCTION,

Appellant,

v.

THE MAYOR AND ALDERMEN OF THE CITY OF
SAVANNAH,

Appellee.

NOTICE OF INTENT TO SEEK CERTIORARI

David A. Webster
Georgia Bar No. 744975
50 Hurt Plaza, Suite 700
Atlanta, Georgia 30303
(404) 588-9000

Attorney for Appellant

(A17)

511 Courthouse Building,
Savannah, Georgia 31401.
6 December 1989.

Mr. John Fuller,
1007 West Bay Street,
Jacksonville, Florida 32204.

Dear Mr. Fuller,

Referring to our telephone conversation of Monday, December 4, 1989, concerning the case of John Fuller, Individually, and d/b/a Party Time Productions versus The Mayor and Aldermen of the City of Savannah, Civil Action Number X82-18093.

I have no recollection or record of being subpoenaed to appear at the trial of this case.

I do not remember at this time the exact progression of events leading up to the preparation of the transcript in this case, but I am aware of the usual procedure and certain situations that existed during this period. When someone telephones for a transcript to be prepared, it is our practice to ask for a letter requesting the transcript before beginning. I have not been able to locate the letter requesting same, but I am certain one must have been written since the transcript was prepared.

This case was taken by Mrs. Alida Smith, who is an extremely competent court reporter, and as a rule is very up to date with her transcripts. However, during the early and mid part of 1988 Mrs. Smith was suffering a back disability and was unable to type for any extended period of time. This did cause some out of the ordinary delays in various transcripts being prepared by her.

(A17) cont.

I do not remember this case specifically, but I am sure it fell in that category. If I can be of any further assistance in this matter, please do not hesitate to contact me.

Very truly yours,

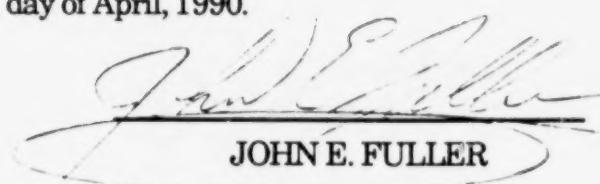
William M. DeLoach,
Court Reporter

CERTIFICATION OF SERVICE

This is to certify that I have this day served three copies of the within and foregoing "WRIT OF CERTIORARI" upon opposing counsel by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon, as follows:

Patrick T. O'Conner
Freidman, Haslam, Weiner, Ginsberg,
Shearouse & Weitz
P. O. Box 10105
Savannah, GA 31412-0305

This 11 day of April, 1990.


JOHN E. FULLER

In The
Supreme Court of the United States
October Term, 1989

JOHN E. FULLER, Individually and d/b/a
PARTY TIME PRODUCTIONS,

Petitioner,

v.

THE MAYOR AND ALDERMEN OF THE CITY
OF SAVANNAH, GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA

Counsel of Record for Respondent:

PATRICK T. O'CONNOR, ESQUIRE
OLIVER MANER & GRAY
Post Office Box 10186
Savannah, Georgia 31412
(912) 236-3311

Additional Counsel for Respondent:

JAMES B. BLACKBURN, ESQUIRE
WISEMAN, BLACKBURN & FUTRELL
240 West Broughton Street
Savannah, Georgia 31401
(912) 232-2136



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In The
Supreme Court of the United States
October Term, 1989

JOHN E. FULLER, Individually and d/b/a
PARTY TIME PRODUCTIONS,

Petitioner,
v.

THE MAYOR AND ALDERMEN OF THE CITY
OF SAVANNAH, GEORGIA,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA**

STATEMENT OF THE CASE

Petitioner Fuller, d/b/a Party Time Productions, contracted with the Mayor and Aldermen of the City of Savannah, Georgia (the "City" or "City of Savannah") in June, 1980 to lease the Savannah Civic and Convention Center for a July 4th Peabo Bryson concert. Petitioner was the promoter for the event. Because of inadequate ticket sales and resulting financial difficulties, the performers refused to present a show. Petitioner, individually and doing business as Party Time Productions, sued the City

of Savannah asserting state law claims for breach of contract, unlawful interference with contractual relationships, misrepresentation, false imprisonment, and negligence. He also made claims pursuant to 12 U.S.C. Sections 1982 and 1983. The City asserted a counterclaim for expenses incurred as a result of the lease plus punitive damages and costs.

Prior to trial, summary judgment was granted to the City on the Sections 1982 and 1983 claims and certain of the state law claims. The state law breach of contract claims and the state law counterclaim were tried to a jury in October, 1987. The jury found for Petitioner Fuller in the amount of \$2,135.50 and for the City in the amount of \$2,135.50 plus interest on the counterclaim. Judgment was entered on the verdict by the trial court.

Petitioner then moved for a new trial, but the motion was denied. Petitioner filed a notice of appeal to the Georgia Court of Appeals on March 4, 1988 from the verdict and denial of motion for new trial. No appeal was taken from the summary judgment ruling. On October 14, 1988, the City moved under state law to dismiss the appeal on the ground that the Plaintiff's failure to have a transcript filed was inexcusable and unreasonable. The trial court granted the City's motion to dismiss the appeal on November 18, 1988 pursuant to Georgia law. Petitioner allegedly did not receive the order dismissing his appeal and on January 27, 1989 he moved for an order *nunc pro tunc*. The trial court re-entered its order dismissing the appeal on February 1, 1989, *nunc pro tunc* November 17, 1988. Petitioner then appealed to the Georgia Court of Appeals from the *nunc pro tunc* order, raising only state law issues. The Court of Appeals of the State of Georgia

affirmed the trial court's dismissal of Petitioner's appeal on state law grounds. Petitioner then applied to the Georgia Supreme Court for a Writ of Certiorari on state law enumerations of error but the writ was denied.

Petitioner did not raise a federal question in his motion for new trial to the trial court. (See appendix 10 to Petitioner's application for certiorari). Petitioner did not raise a federal question in his enumerations of error to the Georgia Court of Appeals. (See appendix 15 to Petitioner's application for certiorari). Petitioner did not raise a federal question in his application for certiorari to the Georgia Supreme Court. (See appendix 16 to Petitioner's application for certiorari).

The Georgia Court of Appeals' opinion is reported at 192 Ga. App. 716, 389 S.E.2d 7 (1989).

SUMMARY OF THE ARGUMENT

A. The Supreme Court of the United States does not have jurisdiction in this case because no federal question was raised in the State Court to which certiorari is sought.

B. There is no adequate basis for this Court's exercise of its discretion to grant a writ of certiorari.

ARGUMENT

A. The Supreme Court of the United States does not have jurisdiction in this case because no federal question was raised in the State Court to which certiorari is sought.

No federal questions were raised on the appeal of this case to the Georgia Court of Appeals. The sole federal question raised prior to the present application for certiorari appeared in Plaintiff's complaint in the form of a claim for damages under 12 U.S.C. Section 1982 and 1983. However, those claims were resolved upon the Mayor and Aldermen of the City of Savannah's motion for summary judgment, from which no appeal was taken. As shown in the enumeration of errors from the trial court to the Court of Appeals of the State of Georgia (appendix 15 to Petitioner's application for certiorari to this Court) the only matters raised on appeal were state law claims. Likewise, the only questions raised on the petition for certiorari to the Georgia Supreme Court dealt solely with state law questions.

This Court has held repeatedly that it will not decide federal constitutional issues raised here for the first time on review of State Court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed.2d 398 (1969). *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed.2d 346 (1973).

As pointed out in *Cardinale v. Louisiana*, federal questions not raised in the State Court system are those on which the record is very likely to be inadequate, since it was not compiled with those questions in mind. "And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state

statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground."

Now, for the first time on appeal, Petitioner raises federal constitutional questions. Petitioner has, however, not preserved those claims and this Court, therefore, has no jurisdiction to hear an appeal. The Petition should be denied.

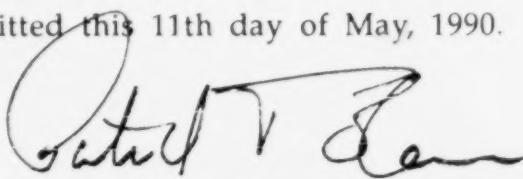
B. There is no adequate basis for this Court's exercise of its discretion to grant a writ of certiorari.

The Petitioner has not raised a sufficient basis for the exercise of this Court's discretion to grant certiorari. Because no federal questions were raised nor reviewed by the Georgia Court of Appeals, none of the reasons for granting a Petition for Certiorari are present in this case. See Rule 10 of the Rules of the Supreme Court of the United States; 28 U.S.C. Section 1257. The petition for writ of certiorari should, therefore, be denied.

CONCLUSION

Petitioner's application for a writ of certiorari must be denied because this Court does not have jurisdiction to hear the case. The federal questions sought to be raised in this petition were not raised in the Georgia Court of Appeals. Second, the application for certiorari does not raise any ground upon which this Court should exercise its discretion in granting writ.

Respectfully submitted this 11th day of May, 1990.



PATRICK T. O'CONNOR
Attorney for Respondent

OLIVER MANER & GRAY
Post Office Box 10186
Savannah, GA 31412
(912) 236-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served petitioner in the foregoing matter with a copy of this document by placing a copy of the same in the United States Mail with adequate postage thereon addressed as follows:

John E. Fuller
1008 West 17th Street
Jacksonville, FL 32209
(904) 356-8565

This 11th day of May, 1990.

OLIVER MANER & GRAY



PATRICK T. O'CONNOR
Attorney for Respondent

Post Office Box 10186
Savannah, GA 31412
(912) 236-3311

MAY 23 1990

JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1601

**In the Supreme Court of the
United States
OCTOBER TERM, 1989**

JOHN E. FULLER
d/b/a PARTY TIME PRODUCTIONS
Petitioner

vs.

THE MAYOR AND ALDERMAN OF THE
CITH OF SAVANNAH, GEORGIA
Respondent

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

John E. Fuller, Pro Se
1008 West 17th Street
Jacksonville, FL 32209

Respondents Attorney

Patrick T. O'Connor, Esquire
Oliver, Maner & Gray
Post Office Box 10186
Savannah, GA 31412-0305

May 20, 1990



STATEMENT

The respondents brief claims that the Supreme Court has no jurisdiction in this case solely because no federal question was raised in the state court. This claim is incorrect.

JURISDICTION

A. Under Rule 28, USCS §1257 the Supreme Court has jurisdiction because;

- 1) This is a case which has a final decision coming from a court of last resort.
- 2) The validity of a state statue has been drawn into question.
- 3) A right that has specificity been set up under the United States Constitution has been violated.
- 4) Jurisdiction to review a case for appeal or certiorari needs only the presence of a federal question in the case.

B. Per the record and the respondents own admission (Page 4, respondents brief), a federal question was raised in the trial court. This question concerned the plaintiffs 5th & 14th U.S. Constitutional Amendment Rights. The trial court disposed of the question by granting defendants motion for Summary Judgement. The Summary Judgement was appealed to the Georgia Court of Appeals, (See App 15).*

HOW THE FEDERAL QUESTION WAS PRESENT

A. Trial Court

- 1) The federal question was present in the petitioners letter requesting a continuance, (App 8).
- 2) Petitioner presented a federal question to the trial court when he orally requested a continuance because he needed time to have witnesses as well as an attorney, (App 1).

*NOTE; All appendix references appears in petitioners application for certiorari.

- 3) Plaintiff/Petitioner stated a federal question in his claim of false imprisonment.

B. Georgia Court of Appeal

- 1) Federal questions were raised in Appellant's Enumeration of Errors (App 15)
- 2) Federal questions were present in Appellant's Brief. (Recorded but not reprinted in petition).

RULINGS ON THE FEDERAL QUESTIONS

A. Trial Court

- 1&2) The federal questions were denied by the trial court (App 1).
- 3) The trial judge granted Summary Judgement in favor of the respondent, (App 1).

These rulings clearly violates the petitioners constitutional rights.

B. Georgia Court of Appeals

- 1&2) The Georgia Court of Appeals ruled on the Appellant Appeal, (App 4). They declared the Enumeration of Errors and the remaining issues in the brief which included the appeal of the Summary Judgement to be Moot.

This declaration by the Appeals Court ruled the federal questions present in the appeal brief to be unimportant.

SUMMARY

Contrary to the respondents claim, substantial federal questions were present and raised in both courts. The courts ruled on the issues and their rulings are contrary and repugnant to the 5th,6th,7th and 14th amendments of the U.S. Constitution.

CONCLUSION

Because of the aforementioned reasons the Supreme Court of the United States does have jurisdiction to hear this case. For the reasons setforth in the Petition and this Reply Brief it is respectfully submitted that the Petition For Writ Of Certiorari be granted. Thank You.

